

Rule 35. En Banc Determination

(a) **When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

- (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
- (2) the proceeding involves a question of exceptional importance.

(b) **Petition for Hearing or Rehearing En Banc.** A party may petition for a hearing or rehearing en banc.

- (1) The petition must begin with a statement that either:
 - (A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or
 - (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.
- (2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.
- (3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

(c) **Time for Petition for Hearing or Rehearing En Banc.** A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.

Rule 35. En Banc Determination**(a) General.**

- (1) **Decision to Review En Banc.** A case will be reviewed en banc if a majority of the judges in regular active service agree to hear it en banc. Judges who are recused or disqualified from participating in the case are counted as judges in regular active service.
- (2) **Arguing to a Panel to Overrule a Precedent.** Although only the court en banc may overrule a binding precedent, a party may argue, in its brief and oral argument, to overrule a binding precedent without petitioning for hearing en banc. The panel will decide whether to ask the regular active judges to consider hearing the case en banc.
- (3) **Fivolous Petition.** A petition for hearing or rehearing en banc that does not meet the standards of Federal Rule of Appellate Procedure 35(a) may be deemed frivolous and subject to sanctions.

(b) Statement of Counsel.

- (1) **Petition for Hearing En Banc.** A petition that an appeal be initially heard en banc must contain the following statement of counsel at the beginning:

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance: (set forth each question in a separate sentence).

/s/ _____

ATTORNEY OF RECORD FOR _____

- (2) **Petition for Rehearing En Banc.** A petition that an appeal be reheard en banc must contain one or both of the following statements of counsel at the beginning:

Based on my professional judgment, I believe the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedent(s) of this court: (cite specific decisions).

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance: (set forth each question in a separate sentence).

/s/ _____

ATTORNEY OF RECORD FOR _____

FEDERAL RULES OF APPELLATE PROCEDURE

- (d) **Number of Copies.** The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.
- (e) **Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response.
- (f) **Call for a Vote.** A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.

FEDERAL CIRCUIT RULE

(c) Petition for Hearing or Rehearing En Banc; Response.

- (1) **Certificate of Interest.** A certificate of interest (see Federal Circuit Rule 47.4) must be included in a petition for a hearing or rehearing en banc or a response to such a petition. The certificate must appear immediately following the cover.
- (2) **Items Excluded from Page Limitation.** The following items do not count against the page limitation in Federal Rule of Appellate Procedure 35(b)(2):
 - (A) the certificate of interest;
 - (B) the table of contents;
 - (C) the table of citations; and
 - (D) any addendum containing statutes, rules, regulations, and similar matters.
- (3) **Rehearing En Banc: Copy of Opinion or Judgment.** A petition for a rehearing must include a copy of the opinion or the judgment of affirmance without opinion. The copy must be bound with the petition as an appendix.
- (4) **Number of Copies.** Fifteen copies of a petition for a hearing or rehearing en banc must be filed with the court. Two copies must be served on each party separately represented.

(d) Combined Petition for Panel Rehearing and Rehearing En Banc. If a party chooses to file both a petition for panel rehearing, (see Federal Circuit Rule 40), and a petition for a rehearing en banc, then the two must not be filed separately, they must be combined. A combined petition for panel rehearing and rehearing en banc must comply with Federal Circuit Rule 35(c). The cover of a combined petition must indicate that it is a combined petition.

(e) Contents of Petition for Hearing En Banc, Rehearing En Banc, and Combined Petition; Response.

- (1) **Petition for Hearing En Banc.** The preferred contents and organization for a petition for a hearing en banc are:
 - (A) yellow cover with the information prescribed in Federal Rule of Appellate Procedure 32(a)(2);
 - (B) the certificate of interest (see Federal Circuit Rule 47.4);
 - (C) the table of contents;
 - (D) the table of authorities;
 - (E) the statement of counsel required in Federal Circuit Rule 35(b);

- (F) the argument; and
 - (G) the proof of service (see Federal Rule of Appellate Procedure 25(d)).
- (2) **Petition for Rehearing En Banc.** The preferred contents and organization for a petition for a rehearing en banc are:
- (A) yellow cover with the information prescribed in Federal Rule of Appellate Procedure 32(a)(2);
 - (B) the certificate of interest (see Federal Circuit Rule 47.4);
 - (C) the table of contents;
 - (D) the table of authorities;
 - (E) the statement of counsel required in Federal Circuit Rule 35(b);
 - (F) the argument;
 - (G) the addendum containing a copy of the court's opinion or judgment of affirmance without opinion sought to be reheard; and
 - (H) the proof of service (see Federal Rule of Appellate Procedure 25(d)).
- (3) **Combined Petition for Panel Rehearing and Rehearing En Banc.** The preferred contents and organization for a combined petition for panel rehearing and a rehearing en banc are:
- (A) yellow cover with the information prescribed in Federal Rule of Appellate Procedure 32(a)(2);
 - (B) the certificate of interest (see Federal Circuit Rule 47.4);
 - (C) the table of contents;
 - (D) the table of authorities;
 - (E) the statement of counsel required in Federal Circuit Rule 35(b);
 - (F) the points of law or fact overlooked or misapprehended by the panel of the court;
 - (G) the argument in support of a rehearing;
 - (H) the argument in support of rehearing en banc;
 - (I) the addendum containing a copy of the court's opinion or judgment of affirmance without opinion sought to be reheard; and
 - (J) the proof of service (see Federal Rule of Appellate Procedure 25(d)).
- (4) **Response.** If a response is requested by the court, the preferred contents and organization are:

- (A) brown cover with the information prescribed in Federal Rule of Appellate Procedure 32(a)(2);
- (B) the certificate of interest (see Federal Circuit rule 47.4);
- (C) the table of contents;
- (D) the table of authorities;
- (E) argument against a rehearing, rehearing en banc, or both;
- (F) the proof of service (see Federal Rule of Appellate Procedure 25(d)).

(f) Additional Copies of Briefs in Cases to be Heard En Banc. Within 7 days after the order granting a rehearing en banc, counsel must file 30 sets of the briefs that were before the panel that initially heard the appeal, unless the court directs otherwise.

(g) Length of Amicus Curiae Brief. Except by the court's permission or direction, an amicus curiae brief submitted in connection with a petition for hearing en banc, a petition for rehearing en banc, or a combined petition for panel rehearing and rehearing en banc, must be accompanied by a motion for leave and must not exceed 10 pages.

Practice Notes

Hearing or Rehearing En Banc. The court may sua sponte order that an appeal be initially heard or be reheard en banc. The panel or a judge on the panel that is considering a case may at any time request the active judges of the court to hear or rehear the case en banc with or without further briefs or argument by counsel.

Rehearing En Banc; Senior Judges. If a senior judge participated in the original hearing and disposition of a case for which rehearing en banc is granted, that senior judge may participate fully in the rehearing.

Combined Petition for Panel Rehearing and Rehearing En Banc. When a combined petition for panel rehearing and petition for rehearing en banc is filed, the petition for panel rehearing is decided first in the same manner as a petition for panel rehearing without an accompanying petition for rehearing en banc.. If the panel grants the requested relief, the petition for rehearing en banc is deemed moot.

Petition for Rehearing En Banc referred to Panel. A petition for rehearing en banc is presumed to request relief that can be granted by the panel that heard the appeal, and action on the petition for rehearing en banc will be deferred until the panel has an opportunity to grant the relief requested.

Timeliness. A petition for hearing or rehearing en banc is filed when the court receives it, not on mailing. The clerk will return an untimely petition for hearing or rehearing en banc.

Non-Precedential Opinions. A petition for rehearing en banc is rarely appropriate if the the appeal was the subject of a non-precedential opinion by the panel of judges that heard it.

Writ of Certiorari. Filing a petition for a panel rehearing or for rehearing en banc is not a prerequisite to filing a petition for a writ of certiorari in the Supreme Court.